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No. 299

In the

Supreme Court of the United States

OCTOBER TERM 1956

JEANICE STRATTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RALPH PRINCE,
Gladewater, Texas.

WARREN G. MOORE,
502 Fair Foundation Bldg.,
Tyler, Texas.

JAMES R. LEWIS,
502 Fair Foundation Bldg.,
Tyler, Texas,
Counsel for Petitioner.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decree and judgment of the Circuit Court of Appeals for the Fifth Circuit entered on May 8, 1956, in the above entitled case, reversing the judgment of the District Court for the Eastern District of Texas in favor of petitioner, under date of June 1, 1955, and rendering judgment for the respondent herein.

OPINIONS BELOW

The District Court did not render an opinion nor make findings of fact and conclusions of law. Its judgment rendered June 1, 1955, is found at R. 81-83. The opinion of the Circuit Court of Appeals, filed May 8, 1956, is reported in 232 F. 2d 880, advance sheet of June 25, 1956, and for convenience is printed in an appendix to the brief filed with this petition, and may also be found at R. 92-100.

BASIS OF JURISDICTION

Jurisdiction is invoked under Section 1254(1) of 28 U. S. C. A., as amended June 25, 1948, c. 646, 62 Stat. 928.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, with one judge dissenting, was filed May 8, 1956. No petition for rehearing was filed. The mandate and judgment of the Circuit Court, reversing and rendering the judgment of the District Court, was issued under date of May 8, 1956, and was filed in the office of the Clerk of the District Court for the Eastern District of Texas on the ninth day of July, 1956. The mandate may be found at R. 101.

QUESTIONS PRESENTED

The fundamental questions presented in this petition are: (a) Whether an appellate court, in reviewing a judgment of a trial court enforcing liability under a National Service Life Policy where the judgment was based on jury verdict which was supported by substantial, though conflicting, evidence, may substitute its judgment for that of

the jury as to the weight to be given to, and the inferences to be drawn from, that evidence; and (b) whether, upon reaching conclusions contrary to those of the jury as to the existence of fraudulent intent on the part of the insured when he made misrepresentations in an application for reinstatement of his policy, the appellate court may set the jury verdict aside and reverse the judgment of the District Court, where the evidence was such that without weighing the credibility of witnesses, reasonable men could have differed as to the existence or non-existence of the alleged fraudulent intent.

STATUTES INVOLVED

The Statute involved is the National Service Life Insurance Act of 1940, as amended, 38 U. S. C., Sec. 801 et seq., particularly subsections 802(w) and 817.

SUMMARY STATEMENT

The suit, brought by the widow of Kenneth Bennet Stratton, was to recover on a National Service Life Insurance policy for $10,000 issued under the provisions of the National Service Life Insurance Act of 1940, as amended, to Stratton on May 1, 1942, during and in consequence of his military service (R. 5-7).

The claim asserted was that on February 9, 1953, while the policy of insurance was in full force, the veteran had died; that plaintiff had duly made claim for payment of the policy upon the Veterans' Administration, and that the claim was denied and payment refused (R. 6). The autopsy

indicated a brain tumor as the primary cause of death (Def. Ex. 3, R. 75).

The defense was that the insured had failed, within the grace period, to tender the premium due on the policy on December 1, 1951 (R. 9), in consequence of which the policy had lapsed, and was not in force, notwithstanding an attempted reinstatement of the policy by application for reinstatement submitted by the veteran on January 17, 1952, on the form "Statement of Health" (R. 9-10), since the reinstatement was not effective because obtained by fraudulent misrepresentations consisting of the answers "yes" to Question No. 1, reading: "Were you in as good health on the date of tender shown on the face of this letter (Def. Ex. No. 2, R. 73) as you were on the due date of the premium in default?" and "no" to Question No. 2, reading: "Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since the due date of the premium in default?"

The cause was tried to a jury, and upon denial of defendant's motion for a directed verdict, there was a verdict and judgment for plaintiff (R. 81-83). Motion for New Trial was overruled (R. 83).

From the judgment of the trial court an appeal to the United States Circuit Court of Appeals for the Fifth Cir-

cuit was duly perfected, and the cause docketed in that court as Cause No. 15,836, on the 25th day of October, 1955 (R. first inside page), and thereafter the Court of Appeals, after hearing duly held, entered judgment under date of May 8, 1956, reversing and rendering the judgment of the District Court (R. 101).

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals for the Fifth Circuit has decided an important question, vitally affecting the rights of all veterans holding policies of insurance under the National Service Life Act, and indeed of policy holders generally, in a manner which is inconsistent with the rule of decision of this Court in *Pence v. United States, 316 U. S. 332*, the decision of the Circuit Court of Appeals for the Eighth Circuit in *Wharton v. Aetna Life Insurance Co., 48 F. 2d 37*, the settled rule of decision in the Supreme Court of Texas, *Great Southern Life Insurance Co. v. Doyle, 145 Tex. 579, 151 S. W. 2d 197; Clark v. National Life & Accident Insurance Company (Sup. Ct.), 200 S. W. 2d 820*, and with its own prior decisions in *Atlantic Life Insurance Co. v. Stringer, 28 F. 2d 665*, and *Cardwell v. United States, 186 F. 2d 382*, in that the rule of decision with regard to fraudulent misrepresentations in an application for a policy of insurance, or for reinstatement thereof, announced in these decisions is as stated in the *Cardwell* case:

> "* * * [W]hen reasonable men may differ as to whether a representation was material or whether a false answer was made with intent to deceive, those

questions must be submitted to the jury," citing the *Atlantic Life Insurance Company* case and the Wharton case, supra.

Whereas, in the instant case, the Circuit Court of Appeals has reversed the judgment of the District Court, and in effect, set aside a jury verdict founded upon substantial, though conflicting, evidence, apparently because a majority of the Court felt that the *more reasonable* inference to be drawn from the evidence was that the veteran had made the misrepresentations in his application for reinstatement of his policy of insurance with a conscious intent to defraud, notwithstanding that the judge and jury who tried the case had reached an opposite conclusion, and one judge of the Circuit Court thought that opposite conclusion was one which the triers of the fact could reasonably have made from the evidence.

The decision of the Circuit Court in this case works a misapplication of the rule to which it avowedly adheres, in that under the postulate of that rule, the issue of fraudulent intent must not only be *submitted* to the jury in every instance where reasonable men could differ as to the inferences warranted by the evidence, but in such case that issue should be *decided* by the jury, *Atlantic Life Insurance Co. v. Stringer*, supra, whereas, in the instant case, two judges of the Circuit Court have in effect substituted their judgment as to the permissible inferences to be drawn from evidence which is truly substantial, for the judgment of the twelve members of the trial jury and the

trial judge, with one of the learned Circuit Judges registering a strong dissent.

In so deciding, the majority of the Circuit Court necessarily say by their decision that the evidence left no room for conjecture and that reasonable men simply could not have reached an opposite and tenable conclusion from that evidence. Thus the line of distinction as to what is a reasonable inference to be drawn from opposing propositions of fact based on conflicting evidence becomes tenuous and all too indistinct for practical application. As stated by Judge Cameron in his dissent: "We are setting aside the fact-findings of a court and jury who were in best position to reach a just conclusion on this issue of fact."

It is believed that in the circumstances here presented, the Circuit Court has erred in not adhering more closely to the familiar rule in all the American courts to the effect that in determining whether the evidence is sufficient to justify reasonable men in differing, the court is not to weigh the credibility of witnesses, and should accept as true all evidence which, when liberally construed in favor of the party relying thereon to avoid an instructed verdict or to sustain a favorable verdict, tends to support such party's contention, and should indulge every reasonable inference which can properly be drawn in his favor from the evidence and discard all contradictory evidence favorable to the opposing party. When the evidence so viewed amounts to more than a scintilla, more than a mere suspicion that the fact propositions asserted by the proponent

of the verdict might be true or that those urged by the opposing party might be false, a fact issue is presented for determination by the jury.

When a question which is indistinguishable from the question here decided was before the same court in *Atlantic Life Insurance Co. v. Stringer*, supra, an exactly opposite result was reached, the court there saying:

> "It may be that he [the insured] believed he had syphilis. The evidence quite strongly indicates that he did so believe, for he not only took the Wasserman test, but, after the result of that proved to be negative, he also proceeded to take a recognized remedy for syphilis. *But at last it rested with a jury to determine what his opinion was.*"[1]

To be considered here also is the important fact that much of the evidence supporting the respondent's view consisted of *opinion* evidence, which even if uncontroverted is ordinarily not conclusive, and the inferences to be drawn therefrom are peculiarly within the province of the jury. *Sartor v. Arkansas Natural Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; Coxson v. Atlanta Life Insurance Co., 142 Tex. 544, 179 S. W. 2d 943 (1944); 3 McDonald, Texas Civil Practice, Sec. 11.28, p. 1037 et seq.*, and cases cited.

Moreover, the very fact that the dissenting Circuit judge, as well as the trial judge and the twelve members of the trial jury, reached a different conclusion as to the inferences warranted by the evidence from the conclusion reached by the two Circuit judges constituting the major-

[1] All emphasis herein is supplied unless otherwise indicated.

ity of the Circuit Court is evidence that reasonable men could differ as to permissible inferences from the evidence. *Raynolds Holding Co. v. El Paso Electric Company, Tex. Civ. App., 70 S. W. 2d 624, 627*, affirmed without discussion of the point, *100 S. W. 2d 97*.

Since the verdict of the jury properly may be set aside by the court, and the "sentence of the law" called forth upon the facts found by the court only if the evidence, considered without weighing the credibility of the witnesses, would have justified no other conclusion except the existence of all the constituent elements of the fraud asserted as a defense, including *intent* to deceive, any criterion for determining the legal import of the evidence which is predicated upon conditions known only to the attending physicians, and upon diagnoses which admittedly were only tentative and inconclusive, and not shown to have been communicated to the veteran, and which fails to take account of the undisputed evidence that his attending physicians *told* the insured prior to his execution of the application for reinstatement on January 17, 1952, that they could find nothing seriously wrong with his physical condition, is manifestly not a proper criterion, because it ignores the existence of *countervailing* evidence, which this Court said was absent in the *Pence* case, but which, if present, would have required the determination of the question of fraud by the jury.

The evidence is without dispute that following his discharge from the hospital on January 10, 1952, Stratton's

general health was good during the next thirteen months (R. 20, 21, 52-75), and was good on the very day he signed the application for reinstatement (R. 21). Also without conflict in the record, the evidence shows that Stratton and his wife were not apprehensive about his condition during the period immediately prior to his examination in Dallas on January 18, 1952, because the insured had already had quite a number of tests and "*the doctors said they didn't find anything wrong*" (R. 23). "* * * we had found nothing and we *explained to Kenneth* that we had found nothing * * *" (R. 37). This last statement was from one of the two doctors in attendance on the veteran from the inception of his illness in January, and who therefore, must have known more about what the insured's condition was and what he was told about it than anyone else, other than the insured himself and the other physician attending him.

Not only does the decision of the Circuit Court fail to give adequate weight to the foregoing and much more evidence of a "countervailing" nature, but the opinion proceeds upon an assumption of fact which is clearly erroneous, as below demonstrated. From the footnote on page 3 of the opinion (R. 94), and commencing near the bottom of that page we quote:

> "The only definite diagnosis reached by the medical staff of the hospital was with reference to the apparent bleeding from the stomach, which was diagnosed as a bleeding peptic ulcer. Treatment for that condition was immediately instituted and *continued for several months on return visits to the hospital after the insured was discharged.* * * *."

According to the record, not only was the treatment for peptic ulcer not shown to have been *continued for several months*, but on the contrary, the record shows that this treatment, at least so far as medication was concerned, was *stopped* on January 18, 1952 (R. 33), and we are unable to find any showing in the record where such treatment was ever resumed. This was the testimony from Dr. Bloom (R. 33):

> "He was seen relative to his stomach on January 18th.
>
> "* * *.
>
> "* * * And at that time the medication which had been given him for his stomach was causing a regurgitation, he wasn't passing his food into his intestinal tract, *so the medication was stopped.*"

The record discloses (R. 33-34) that the insured received further treatment at the hospital on only the following occasions subsequent to January 18, 1952:

> On March 3, 1952, when he was "doing very well," and x-rays were *scheduled* for his stomach.
>
> On March 5, 1952, there was a note by Doctor Eichenlaub stating the insured "is doing very much better."
>
> On March 11, 1952, he was in the hospital and received treatment for a *head laceration* sustained in an automobile accident.
>
> On March 12, 1952 he complained of and was treated for backache, "probably in connection with his car accident, * * *."

On April 16, 1952, "he came in with this pain in his right flank. * * *."

On June 6 to June 9, 1952, he was in the hospital where he was treated for "Gastro-enteritis—inflamation, intestinal flu—whatever name you want to give them."

On July 1, 1952, "he was again treated for backache."

On August 1, 1952, he was "much improved, and that was the *last time* we had any opportunity to treat Mr. Stratton."

Whether the "scheduled" x-rays were ever made, or if so, what they indicated, and whether Stratton was ever informed of anything indicated by the x-rays, if made, the record does not show. The record does show on page 35 that Dr. Bloom testified: "But rather than make an error we treated him for an ulcer and that's the safe procedure to follow." Since no time period covered by this treatment is stated, however, manifestly it would be pure conjecture and speculation as to whether this treatment continued beyond January 18, 1952.

As before pointed out on page 3 hereof, the autopsy indicated that the primary cause of death was brain tumor. It is therefore, apparent that stomach trouble, whether caused by a bleeding peptic ulcer or some other condition, was not the cause of death. Yet these were the conditions which, had they been serious, would have been most likely to have been known to the insured, and the very fact that

such conditions proved to be of little importance would certainly have warranted the jury in concluding that Stratton had probably given them but little concern when he executed the application for reinstatement of his policy of insurance.

CONCLUSION

With practical wisdom, Judge Cameron observed in his dissent that the printed record is not a good medium for making determinations as to what is or was in a man's mind. But surely it is not unreasonable for the jury to have concluded that since Stratton was already going about his affairs after only so brief an interruption, and after he had been told by his doctors that they had found nothing seriously wrong with his condition, the state of his mind about his own condition must have been strongly influenced by those facts. Surely, the judge and the jury who tried the case and saw and heard the witnesses were in the best position to "make a just conclusion" as to whether he did or did not act with a conscious intent to deceive and defraud in executing the application for policy reinstatement. Their findings should not be overturned, except for the most compelling reasons, and we believe such reasons have not been shown in this case, and say with Judge Cameron and Mr. Justice Storey that fraud should not be imputed to the dead "unless the evidence of fraud be clear, beyond a reasonable doubt," *Provost v. Gratz, 6 Wheat. 481, 496-7* (R. 99).

It is accordingly respectfully urged that this petition for writ of certiorari should be granted.

Respectfully submitted,

RALPH PRINCE,
Gladewater, Texas.

WARREN G. MOORE,
502 Fair Foundation Bldg.,
Tyler, Texas.

JAMES R. LEWIS,
502 Fair Foundation Bldg.,
Tyler, Texas,
Attorneys for Petitioner.

Date:

CERTIFICATE OF SERVICE

I, WARREN MOORE, one of the attorneys for Jeanice Stratton, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of August, 1956, I served copies of the foregoing Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, filed in the Supreme Court of the United States, on the parties thereto as follows:

On the United States, by leaving a copy thereof at the office of William M. Steger, United States Attorney for the Eastern District of Texas, at Room 310, Federal Building, Tyler, Texas, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

Warren Moore

WARREN MOORE
Attorney for Jeanice Stratton,
502 Fair Foundation Building,
Tyler, Texas.

APPENDIX "A"

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 15,836

UNITED STATES OF AMERICA,
Appellant,

versus

JEANICE STRATTON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

(May 8, 1956.)

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

HUTCHESON, Chief Judge: Brought by the widow of Kenneth Bennett Stratton, the suit was to recover on a National Service Life Insurance policy for $10,000 issued to Stratton on May 1, 1942, during and in consequence of military service.

The claim was: that on February 9, 1953, while the policy of insurance was in full force and effect, the veteran had died, the autopsy indicating a brain tumor as the primary cause; that plaintiff had made a claim for payment of the policy upon the Veterans' Administration; and that said claim had been denied and payment refused.

The defense was: that the insured had failed, within the grace period, to tender the premium due on December 1, 1951, and the policy had lapsed for non-payment; that, though on January 17, 1952, the veteran did submit an application for reinstatement on the form "Statement of Health"[1] and the policy was reinstated, the answers "yes" to question No. 1 and "no" to question No. 2 were falsely and fraudulently made; and that the reinstatement was not effective because obtained by fraudulent misrepresentations.

[1] "STATEMENT OF HEALTH.

"As a condition of the reinstatement of this insurance, I certify that the answers to the following questions are complete and true to the best of my knowledge and belief. I understand that statements made by me in this application are relied upon in reinstating insurance: that any deception or false statement either by inference, omission, or otherwise may result in cancellation of the insurance or in refusal to pay a claim on the policy: that in either event premiums are not returnable.

"1. Were you in as good health on the date of tender shown on the face of this letter as you were on the due date of the premium in default?

"2. Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since the due date of the premium in default?

"(If answer is 'yes' give all dates and full particulars, and attach, if readily available, a certificate of the practitioner or hospital where treated, with diagnosis, prognosis and treatment.)"

Upon the issues thus made, the cause was tried to a jury, and, defendant's motion for a directed verdict denied, there was a verdict and judgment for plaintiff.

Appealing from the judgment, the United States is here insisting: that the evidence[2] established as matter of law that the certificate of the insured, made on January 17, 1952, a week after his release from the hospital, that he was (1) in as good health on January 8, 1952, the day he had tendered the premiums and the day following his seizure, as he had been on December 1, 1951, the day his defaulted premium was due, and (2) that he had not been ill, had not been prevented from working by reason of illness, and had not consulted a physician since December

[2] Kenneth Bennett Stratton was an intelligent, enegetic, hardworking produce manager and salesman for a wholesale grocery firm. Until January 1952 he appeared to be in good health and to the best of his wife's recollection had not missed a day's work in three years, except "possibly for a cold or something like that." He drove himself to work, however, and was a tense sort of person. Apparently his only complaint, according to his wife, was a "nervous stomach" which occasionally caused him to lose his food.

On January 7, 1952, however, the day before he tendered the overdue premiums, Stratton suffered a complete blackout or loss of consciousness for at least thirty minutes. He was taken to the Gladewater Municipal Hospital, Gladewater, Texas, where he was admitted in an unconscious state. At the time of his admission or shortly thereafter, he vomited blood. Dr. Eichenlaub of the hospital staff immediately began treatment in an attempt both to restore consciousness and to diagnose the cause of the blackout. Stratton's blood sugar and blood calcium were tested while he was still unconscious in order to determine whether hypoglycemia (blood sugar deficiency) or hypocalcemia (blood calcium deficiency) might be the cause of his condition. The insured "finally regained consciousness," but was kept in the hospital four days, through January 10, 1952, in order to complete the studies being made of the possible cause of the blackout and for further treatment. The latter included treatment for the stomach condition and for soreness in Stratton's back, which he believed to have been injured in his fall when he lost consciousness. On January 8th, the day after the blackout, his condition was "much improved" but he was allowed only bathroom privileges. This was the day on which Stratton tendered his remittance to the Veterans Administration.

The only definite diagnosis reached by the medical staff of the hospital was with reference to the apparent bleeding from the stomach, which

1, 1951, was false and fraudulent and the reinstatement was fraudulently obtained; and that the judgment should, therefore, be reversed and here rendered for defendant.

The appellee, pointing out that to avoid a reinstatement of a policy for fraud there must be facts in evidence showing as a matter of law that the assured made a false representation (1) in reference to a material fact, (2) with knowledge of its falsity, and (3) with intent to deceive; and that action was taken in reliance on the representations; insists that, within the teachings of *Pence v. United States*, 316 U. S. 332, and *Cardwell v. United States*, 186 F. 2d 382, the evidence did not establish fraud as matter of law but only made an issue for the jury which was resolved in appellee's favor. Pointing to the difficulties attending and the lack of precision and certainty in the diagnosis made in connection with Stratton's hospitaliza-

---

was diagnosed as a bleeding peptic ulcer. Treatment for that condition was immediately instituted and continued for several months on return visits to the hospital after the insured was discharged. An X-ray examination indicated a crater in the lining of the stomach which might or might not have been an ulcer. There was conflicting evidence as to whether it might have been medically possible for the vomiting of blood (hematemesis) to have been caused by the insured biting his tongue rather than by a peptic ulcer or other internal condition.

No definite diagnosis of the cause of the insured's unconsciousness was reached by the hospital staff, however, since the results of their tests were negative. Among the possible causes under consideration were epilepsy and, as noted, hypoglycemia and hypocalcemia, but only the last two could be tested for at the hospital. The possibility of epilepsy or other brain involvement could not be eliminated without an electroencephalographic tracing for which the hospital lacked the necessary equipment. Dr. Eichenlaub therefore wrote to Dr. Arthur J. Schwenkenberg, a neuro-psychiatrist in Dallas, on or about Jan. 10 or 11, 1952, requesting an appointment for Stratton for an electroencephalographic examination. An appointment was arranged for Jan. 18, 1952. In informing Stratton of the appointment, Dr. Eichenlaub advised him that, while the tests thus far were negative, the examination was not yet complete, and that without the electroencephalogram the cause of the blackout was still undetermined. He told Stratton that his condition might or might not be serious and that further observation was necessary.

tion and medical examinations, appellee insists that the deceased was never definitely advised and he did not know that his condition was fatal or even serious.

Appellant, on its part, putting its reliance in *Pence v. United States*, supra, and in our case of *McDaniel v. United States*, 196 F. 2d 291, urges upon us that the answers given, especially the answer to question No. 2, are so directly contrary to the facts, so unequivocally false, that they could not have been made without knowledge of their falsity and without fraudulent intent. It particularly insists that the action of the decedent in tending the overdue payment on January 8th, the day after his serious attack and hospitalization, together with his act in executing the certificate for reinstatement on January 17th, the day before his appointment for an electroencephalogram examination, are inconsistent with any other conclusion than that, with knowledge of his condition and that he was not entitled to have the policy reinstated, appellee knowingly and fraudulently deliberately made false statements to secure reinstatement.

We think appellant has the right of it and that, upon the undisputed facts, the case is ruled by the Pence and McDaniel cases.

It must be conceded that particular cases of reinstatement have presented difficulties in correctly resolving the question whether the evidence presents an issue for the jury or a question of law for the court, and that in some of the cases the courts seem, in deference to the jury ver-

dict, to have gone dangerously close to abdicating their judicial function. At first blush, this may seem true of the Cardwell case. When, however, the facts of that case are carefully examined and particularly as they are analyzed and appraised in the opinion, it will, we think, be clearly seen that that case is not at all in conflict with the result reached here.

In the McDaniel case, in which sat two of the judges who had decided the Cardwell case, one of them the organ of the court, we undertook to point out carefully the differences in the facts of the two cases and the sameness of the conclusions.

In Cardwell's case we pointed out that the assured was a layman, a carpenter who "not only did not know that he had a serious disease but on the contrary had been advised by his physician that his trouble was imaginary and that there was nothing physically wrong with him." In that case the lapse of the policy had occurred in 1945 and the reinstatement was applied for and the questions answered by his wife two years later. According to her testimony he worked continuously in his trade of carpentry until the latter part of 1948. The only information he had had which might be considered as contrary to his answers was that in November of 1946, nearly a year before he had made his application for reinstatement and two years before he was found to have cancer, he had consulted a Dr. Bell on several occasions for pains in the abdomen, loss of weight and nervousness, and a Dr. Smith for an injured hand and

abdominal pains. Dr. Bell was dead when the case was tried, but Mrs. Cardwell, who had filled in the answers claimed as false, swore that Dr. Bell had told her deceased husband that his trouble was imagination, there was nothing wrong with him, and the evidence showed that Dr. Smith had diagnosed his abdominal pains as a simulated appendix and did not give him any treatment.

Under these facts the court concluded: that the insured had every reason to believe that the ailments, of which he had complained to Dr. Bell, were of a minor and inconsequential nature; that it was not unreasonable for the jury to infer from the evidence that the applicant in good faith did not consider his visits to the doctor of sufficient importance to report them if indeed "*he had this detail in mind when he signed the prepared application for reinstatement.*"

In McDaniel's case, the decedent was a college graduate and a lawyer who, though not told that he had Hodgkins disease, knew that he was seriously disabled and with that knowledge had applied for and received a seventy percent disability compensation rating.

We think the facts in this case, including what was physically happening to the deceased at the very time that he was seeking by statements, which he knew to be false, to obtain a reinstatement of his policy, are of such force as to compel the conclusion that no honest person could reasonably have given the false answers he gave without intending to defraud, and that no jury could have reasonably found that he did not so intend.

The judgment is REVERSED and here RENDERED for the appellant.

CAMERON, Circuit Judge, DISSENTING:

One essaying to judge of a man's intent must look inside him,—at his heart, his mind, his will, his soul. Many intangibles and subtleties are involved. The printed page is not a good medium for making those impalpables articulate.

The Judge and jury, co-laborers in the solution of this fact issue in the Court below, saw the witnesses and heard the testimony from which intent must be inferred. They were in much better position to reach a correct conclusion than we are.

Fraud is never presumed and he who would sustain it as an affirmative defense must establish it by evidence which is clear, convincing, decisive. Where, as here, fraud is charged against one whom death has robbed of the chance to speak for himself, the presumption of honesty and fair dealing is especially strong. Mr. Justice Storey expressed the idea in these words many years ago[1]:

> "Fraud or breach of trust ought not lightly to be imputed to the living; for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt."

[1]Provost v. Gratz, 6 Wheat. 481, 496-7.

The pattern for deciding this case is set by *Cardwell v. United States*, 5 Cir., 1951, 186 F. 2d 382, to which, of all our cases, this one bears the greatest resemblance. In *Cardwell* we held that the trial Court committed error in taking the case away from the jury. Here, we are taking a much longer step. We are setting aside the fact-findings of a court and jury who were in best position to reach a just conclusion on this issue of fact. I would affirm.

A True Copy:
Teste:

.....
Clerk of the United States Court
of Appeals for the Fifth Circuit.

APPENDIX "B"

JUDGMENT

Extract from the Minutes of May 8th, 1956.

No. 15,836

UNITED STATES OF AMERICA,

versus

JEANICE STRATTON.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and here rendered for the appellant, United States of America.

"Cameron, Circuit Judge, dissenting."

APPENDIX "C"

STATUTES INVOLVED

National Service Life Insurance Act of 1940, as amended, 38 USC, Sec. 802(w):

> "Subject to the provisions of section 812 of this title, all contracts or policies of insurance before or after August 1, 1946 issued, reinstated, or converted shall be incontestable from the date of issue, reinstatement, or conversion except for fraud, nonpayment of premium, or on the ground that the applicant was not a member of the military or naval forces of the United States."

Sec. 817:

> "In the event of disagreement as to any claim arising under this subchapter, suit, may be brought in the same manner and subject to the same conditions and limitations as are applicable to the United States Government life (converted) insurance under the provisions of sections 445 and 551 of this title."